BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

TROY M. TODD	)	
Claimant	)	
	)	
VS.	)	
	)	
PYLE, INC.	)	
Respondent	)	Docket No. 1,010,029
	)	
AND	)	
	)	
CONTINENTAL WESTERN INS. CO.	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier request review of the June 15, 2006 Award by Special Administrative Law Judge Marvin Appling. The Board heard oral argument on October 3, 2006.

APPEARANCES

R. Todd King of Wichita, Kansas, appeared for the claimant. Richard L. Friedeman of Great Bend, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. At oral argument before the Board, the parties agreed that claimant's additional compensation (fringe benefits) terminated on January 27, 2003. The parties agreed claimant's pre-injury average weekly wage was $487.50 and after January 27, 2003, the claimant's average weekly wage including the additional compensation was $491.52.

ISSUES

The Special Administrative Law Judge (SALJ) found the claimant sustained a 67 percent work disability. But it is difficult to determine from the award exactly how the SALJ arrived at that work disability percentage.

The respondent requests review of the nature and extent of disability. Specifically, respondent disputes the claimant's percentage of wage and task loss. Respondent argues that a wage should be imputed to claimant because he obtained post-injury employment

and then quit that job to return to school. Respondent further argues claimant has sustained a 44 percent task loss based on Dr. Stein's opinion and a 27 percent wage loss which results in a 35.5 percent work disability.

Claimant argues he is entitled to a 100 percent wage loss because he made a good faith effort to obtain appropriate employment. Claimant further argues he has suffered a 65 percent task loss which results in an 83.5 percent work disability.

The issue for the Board's determination is the percentage of claimant's work disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

It is undisputed claimant suffered a work-related injury on January 17, 2003. Claimant was kneeling on a scissor lift about 12 feet in the air adjacent to a horizontal beam and was pushing a piece of angle iron in place using a two by four. The two by four broke and claimant's forward momentum caused him to fall but his left leg caught on the lift snapping his back.

Dr. Alan Moskowitz performed surgery on claimant's spine on February 10, 2004. The surgery consisted of an anterior diskectomy, with decompression of the spinal canal at L4-5 and L5-S1 as well as an anterior spinal fusion at L4-5 and L5-S1 with insertion of PEEK cages at L4-5 and L5-S1. And a posterior spinal fusion L4 to S1 with insertion of segmental spinal instrumentation L4 to S1. The claimant had aquatic physical therapy for approximately two months and then additional physical therapy for three months.

After claimant was released to light-duty work on August 16, 2004, and was told respondent did not have a position for him, he began a job search and located a job performing inventory control. But once his restrictions were revealed claimant was told that his restrictions could not be accommodated and he returned to his job search. Claimant had contacted this employer in January 2005 and estimated he had contacted between five and ten other prospective employers before that date but noted that before January 2005 he was also trying to get back into school. After January 2005 claimant continued to look for jobs using the internet to search the classified section of the Wichita Eagle newspaper three times a week, made cold calls on businesses and mailed out his resume to approximately 60 prospective employers.

Claimant's continued efforts to locate a job were unsuccessful but in March 2005 the respondent provided claimant the services of Mr. Dan Zumalt to assist claimant in his job

search. Claimant then obtained employment at a greenhouse on April 9, 2005, making $7 an hour for a 40-hour work week. Although claimant worked 49 hours the first week his work hours were reduced each subsequent week until the last week he only worked 24 hours. Claimant noted his work hours were reduced because his restrictions prevented him from doing much other than watering plants. Claimant quit this job May 9, 2005, and returned to school full time at the University of Missouri.

Claimant had credit for approximately 53 college hours before his return to school. He had previously attended Central Missouri State University and the University of Missouri from 1996 through 1998. Claimant had attempted to return to school at the University of Missouri in January 2005. He was readmitted but did not believe he could afford to start school at that time. But claimant later obtained grant money and returned to school for the summer semester which he had just completed at the time of the regular hearing. Claimant took 9 hours of classes and attended the three 50 minute classes 5 days a week. The claimant is majoring in plant sciences with a minor in sustainable agriculture.

Monty Longacre, a vocational rehabilitation counselor, interviewed claimant by telephone on August 2, 2005, at the request of respondent's attorney. He prepared a task list of 48 non-duplicative tasks claimant performed in the 15-year period before his injury. Mr. Longacre opined claimant retained the ability to earn from $7 to $9 an hour.

Jon E. Rosell, Ph.D, a vocational expert, met with claimant on April 5, 2005, at the request of claimant's attorney. He prepared a task list of 39 non-duplicative tasks claimant performed in the 15-year period before his injury. Mr. Rosell opined claimant retained the ability to earn up to $7 an hour.

Dr. Paul Stein examined claimant on March 17, 2005, at the request of respondent's insurance carrier. Dr. Stein opined that claimant had a 25 percent permanent partial impairment of the body as a whole based upon the AMA *Guides'* Lumbosacral Category V.[1] The doctor imposed permanent restrictions that claimant lift no more than 40 pounds with any single lift, 30 pounds occasionally which he defined as up to a third of the day, and 10 pounds more frequently, which he defined as up to two-thirds of the day. The doctor further limited claimant to avoid lifting from below knuckle height and repetitive bending or twisting of the lower back.

Dr. Stein reviewed the task list prepared by Mr. Longacre and opined that claimant would be unable to perform 21 out of the 48 tasks for a 44 percent task loss. Dr. Stein also reviewed the task list prepared by Mr. Rosell and opined that claimant would be unable to perform 22 out of the 39 tasks for a 56 percent task loss.

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[1] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

Dr. Pedro Murati examined claimant on September 29, 2004, at the request of claimant's attorney. Dr. Murati opined that claimant had a 25 percent permanent partial impairment of the body as a whole based upon the AMA *Guides'* Lumbosacral Category V. The doctor imposed permanent restrictions that claimant should not crawl; rarely bend, crouch and stoop; occasionally sit , climb stairs, ladders, squat, drive and lift/carry/push/pull to 35 pounds; frequently stand and walk; lift/carry/push/pull to 20 pounds and alternate sitting, standing and walking.

Dr. Murati reviewed the task list prepared by Mr. Rosell and opined that claimant would be unable to perform 33 out of the 39 tasks for a 85 percent task loss. Dr. Murati also reviewed the task list prepared by Mr. Longacre and opined that claimant would be unable to perform 24 out of the 48 tasks for a 50 percent task loss.

Drs. Stein and Murati agreed claimant suffered a 25 percent permanent partial whole person functional impairment. Consequently, the Board finds claimant has a 25 percent functional impairment.

The disputed issue is the percentage of claimant's work disability. Because claimant has sustained an injury that is not listed in the "scheduled injury" statute, claimant's permanent partial general disability is determined by the formula set forth in K.S.A. 44-510e(a). That statute provides, in part:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

But that statute must be read in light of *Foulk*[2] and *Copeland*.[3] In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e(a) (the predecessor to the above-quoted statute) by refusing to attempt to perform an accommodated job, which the employer had

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[2] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[3] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

offered and which paid a comparable wage. In *Copeland*, the Kansas Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e (Furse 1993), that a worker's post-injury wage should be based upon the worker's ability to earn wages rather than the actual post-injury wages being earned when the worker fails to make a good faith effort to find appropriate employment after recovering from the work-related injury.

> If a finding is made that a good faith effort has not been made, the factfinder *[sic]* will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . .[4]

The Kansas Court of Appeals in *Watson*[5] reiterated that the failure to make a good faith effort to find appropriate employment does not automatically limit the permanent partial general disability to the functional impairment rating. Instead, the Court reiterated that when a worker fails to make a good faith effort to find employment, the post-injury wage for the permanent partial general disability formula should be based upon all the evidence.

The respondent was unable to accommodate claimant's restrictions. After claimant was initially unsuccessful in his efforts to find post-injury employment, respondent provided him the services of a vocational counselor to assist in his job search. The only job located was working in a greenhouse and each week claimant's work hours were reduced until he only worked 24 hours his last week. Claimant then quit his job to return to college as a full-time student. Claimant has not continued his job search.

Although claimant is to be commended for his initiative in returning to school, the law requires injured workers to prove that they have made a good faith effort to find appropriate employment before actual post-injury wages are used in the wage loss prong of the permanent partial general disability formula. And a return to school in order to increase an injured workers' marketability and wage earning ability can under certain factual circumstances be considered a good faith effort to find appropriate employment. But in this instance, claimant has failed to satisfy that burden. Accordingly, a wage will be imputed to claimant.

As previously noted, claimant is seeking a degree in plant science with a minor in sustainable agriculture. Although the vocational experts agreed that obtaining a degree could improve claimant's employability and potentially increase his wages, nonetheless, there was no indication what claimant's wage earning ability would be after obtaining his degree or whether it would restore claimant to a comparable wage. Moreover, given claimant's permanent restrictions, both vocational experts questioned whether claimant's vocational choice is realistic. Mr. Longacre noted that horticulture type work can be very

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[4] *Id.* at 320.

[5] *Watson v. Johnson Controls, Inc.*, 29 Kan. App. 2d 1078, 36 P.3d 323 (2001).

physically demanding and if claimant was required to perform activities such as planting trees and shrubs such activity would not be within his physical restrictions. And Mr. Rosell noted that within the broad category of horticulture claimant's restrictions would prevent him from being a landscape laborer and although claimant could possibly be a cashier at a horticulture store, even that job might violate some of his restrictions.

Mr. Longacre opined claimant retained the ability to earn from $7 to $9 an hour. Mr. Rosell opined claimant retained the ability to earn up to $7 an hour. Respondent provided claimant with assistance in his job search and claimant obtained a job earning $7 an hour. The Board finds that is the best evidence of claimant's ability and imputes $7 an hour for a 40-hour work week as there was no limitation or restriction preventing claimant from a 40-hour work week. A post-injury wage of $280 per week will be imputed to claimant based upon the entire record. This results in a 43 percent wage loss.

The record contains the task loss opinions from two doctors. At Dr. Murati's deposition, claimant's attorney asked the doctor to review a list of former work tasks, which claimant's attorney represented claimant had performed in the 15-year period before the January 17, 2003 accident and which had been prepared by Mr. Rosell with input from claimant. Reviewing that task list, Dr. Murati indicated that claimant had lost the ability to perform 33 out of the 39 tasks or approximately 85 percent. Dr. Murati was also asked to review a list of work tasks prepared by Mr. Longacre with input from claimant. Reviewing that task list, Dr. Murati indicated claimant had lost the ability to perform 24 out of the 48 tasks for 50 percent.

On the other hand, Dr. Stein reviewed the same task lists that Dr. Murati reviewed, but the doctor indicated that claimant should no longer perform 21 out of the 48 tasks from Mr. Longacre's list for a 44 percent task loss and that claimant could no longer perform 22 out of the 39 tasks from Mr. Rosell's list for a 56 percent task loss.

The Board is not persuaded that either doctor's task loss opinions are more accurate than the other. Accordingly, the Board averages Dr. Murati's 85 percent and 50 percent task loss opinions with Dr. Stein's 44 percent and 56 percent task loss opinions and the Board concludes claimant sustained a 59 percent task loss due to the January 17, 2003 accident. Averaging the 43 percent wage loss with the 59 percent task loss, the claimant is entitled to a 51 percent work disability.

AWARD

WHEREFORE, it is the decision of the Board that the Award of Special Administrative Law Judge Marvin Appling dated June 15, 2006, is modified to reflect claimant suffered a 51 percent work disability.

The claimant is entitled to 1.29 weeks of temporary total disability compensation at the rate of $325.02 per week or $419.28 followed by 121.96 weeks of temporary total disability compensation at the rate of $327.70 per week or $39,966.29 followed by 156.44 weeks of permanent partial disability compensation at the rate of $327.70 per week or $51,265.39 for a 51 percent work disability, making a total award of $91,650.96.

As of December 20, 2006, there would be due and owing to the claimant 1.29 weeks of temporary total disability compensation at the rate of $325.02 per week in the sum of $419.28 plus 121.96 weeks of temporary total disability compensation at the rate of $327.70 per week in the sum of $39,966.29 plus 81.46 weeks of permanent partial disability compensation at the rate of $327.70 per week in the sum of $26,694.44 for a total due and owing of $67,080.01, which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of $24,570.95 shall be paid at the rate of $327.70 per week for 74.98 weeks or until further order of the Director.

The record does not contain a filed fee agreement between claimant and his attorney. K.S.A. 44-536(b) mandates that the written contract between the employee and the attorney be filed with the Director for review and approval. Should claimant's counsel desire a fee be approved in this matter, he must file and submit his written contract with claimant to the ALJ for approval.

IT IS SO ORDERED.

Dated this _____ day of December 2006.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: R. Todd King, Attorney for Claimant
Richard L. Friedeman, Attorney for Respondent and its Insurance Carrier
Marvin Appling, Special Administrative Law Judge
Thomas Klein, Administrative Law Judge